Neutral citation [2009] CAT 30

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1111/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

23 November 2009

Before:

VIVIEN ROSE
(Chairman)
THE HON ANTONY LEWIS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

- supported by -

BRITISH SKY BROADCASTING LIMITED

Intervener

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

RULING ON APPLICATION TO AMEND THE NOTICE OF APPEAL

APPEARANCES

Mr. Meredith Pickford (instructed by Osborne Clarke LLP) appeared for the Appellant.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

1. At the case management conference on 2 November 2009, the Tribunal heard an application by the Appellant ("CPW") to amend its notice of appeal lodged on 9 October 2009. At the end of that hearing we said that the application was granted subject to a condition that CPW revise one part of the proposed amendment to give more detail about the matters on which it relies. These are the reasons for our decision to grant permission.

2. The appeal challenges a decision taken by OFCOM called "A new pricing framework for Openreach". That decision imposed price controls on Openreach, a separate access service division of British Telecommunications plc, in relation to unbundled local loops and related services. The decision was adopted on 22 May 2009 after a substantial period of consultation in which CPW was involved. The notice of appeal, as lodged by CPW on 22 July 2009, raises three issues that are agreed to be non-price control matters. One is the "decoupling point", namely that OFCOM should have taken the decision setting the price control for wholesale line rental at the same time that they took this decision on local loop unbundling. The other two points relate to the consultation process carried out by OFCOM, under the heading "inadequate consultation". The first complaint is that OFCOM consulted on a range of possible price control numbers rather than indicating in advance precisely what figures they proposed to adopt. The second complaint is that some of the issues resolved in the final decision were not prefigured in the earlier consultation documents. The amendment that CPW now wishes to make is to include additional paragraphs alleging that OFCOM acted in breach of procedural fairness by refusing to disclose the economic model and underlying information used to arrive at the prices set in the price control for local loop unbundling.

3. Rule 11 of The Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) is in the following terms:

> "11(1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.

> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless—
>
> > (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
> >
> > (b) it was not practicable to include such ground in the notice of appeal; or
> >
> > (c) the circumstances are exceptional"

4. The Tribunal's first task is therefore to decide whether what CPW proposes to introduce constitutes a new ground, in which case one of the three conditions in Rule 11(3) must be satisfied or whether the Tribunal is simply exercising the discretion conferred by Rule 11(1). We were referred by both parties to the Tribunal's judgment in *Floe Telecom Ltd v OFCOM* [2004] CAT 7. In that judgment the then President of the Tribunal explained that the origin of the distinction drawn in Rule 11 was a distinction which is familiar to Continental lawyers between "le moyen" (i.e. the ground relied on) and "les arguments" (i.e. the arguments in support of the ground). The President was careful in that judgment to make clear that it was not the intention in Rule 11 to import that same Continental pleading distinction into the Tribunal's procedure but that it was helpful in indicating the level of abstraction at which the line between Rule 11(1) and Rule 11(3) is intended to be drawn: see *Floe*, paragraph 32.

5. Mr Pickford on behalf of CPW argued that the relevant ground here was "procedural unfairness" currently encompassing both the decoupling point and the two inadequate consultation points. He argued that the new allegation about the non-disclosure of the model was a further argument in support of that plea of procedural unfairness. In the alternative, the new allegation was an expansion of the existing ground of "inadequate consultation" which currently encompassed the point about consultation on a range of prices and the point about the failure to include various issues in the consultation documents. Mr Holmes on behalf of OFCOM argued that the current pleaded case on inadequate consultation is different from the proposed new paragraphs because it is based simply on a comparison of the final decision with the earlier consultation documents, identifying findings in the former which were not prefigured in the latter. Therefore, Mr Holmes argued, the application came under Rule 11(3) not Rule 11(1) of the Tribunal Rules.

6. In our judgment the distinction between amendments which introduce new grounds and amendments which introduce new points in support of existing grounds is intended to be drawn at a fairly high level of abstraction. Given that CPW has already raised issues about the inadequacy of the consultation carried out by OFCOM, it is clear to us what is proposed is a further argument in support of the ground alleging that the consultation process carried out by OFCOM was flawed. We do not therefore need to decide whether, if the only non-price control matter pleaded had been the decoupling point, we would have considered that the proposed amendment was an additional argument in support of a broader ground of "procedural unfairness". We therefore find that this is a case in which the Tribunal is exercising its discretion under Rule 11(1) and there is no need to consider the conditions in Rule 11(3).

7. OFCOM advanced a number of reasons why we should exercise our discretion against allowing this amendment. The first was that the amendment was "sterile". There is no relief claimed as a consequence of the alleged failure to disclose the model since CPW has not asked for declaratory relief and is not seeking remittal of the case to OFCOM. CPW on the contrary is asking for the substantive challenges raised in the appeal to be investigated by the Competition Commission under the procedure set out in sections 192 to 195 of the Communications Act 2003.

8. The Tribunal sees force in CPW's argument that it would be unsatisfactory if complaints about the procedure adopted by OFCOM during the consultation process could only be considered by the Tribunal in a case where an appellant seeks remittal of the case to OFCOM. We recognise that this is an appeal on the merits and that the Competition Commission's determination can correct any errors in the price control at the end of the appeal. But we also recognise that OFCOM are engaged in an ongoing process of conducting consultations and setting price controls as part of their regulatory function. Further, by the time the Competition Commission reaches its conclusion in any particular appeal, it is inevitable that a substantial proportion of the period covered by the price control under challenge may have expired: see the issues considered by the Tribunal in *British Telecommunications plc v OFCOM* [2009] CAT 1. It is therefore important to ensure that the consultation process is fair so that, so far as possible, OFCOM get the price control right in the first place.

9. In any event, although Mr Pickford argued that there was no need for the procedural points to be linked to the substantive points, he indicated that CPW intends to apply to amend the notice of appeal to include substantive challenges to the price control decision to which the failure to disclose the model will be relevant. Mr Holmes for his part accepted that if such substantive challenges were included, then CPW's argument that lack of proper consultation should lead the Competition Commission to increase the intensity of its review of those matters was enough of a link to justify consideration of the procedural point – though he did not, of course, accept that there should be any such heightened intensity of review.

10. We have taken account of all these factors, in particular the importance for CPW of establishing first, that it should have had access to the modelling information during OFCOM's investigation and secondly that the failure to give it that access should affect the Competition Commission's approach to certain aspects of the conduct of its own investigation. We do not consider that the proposed amendment is sterile or that CPW is seeking an "advisory opinion" as Mr Holmes put it.

11. OFCOM's second point was that no proper explanation has been given as to why the plea was not included in the notice of appeal originally lodged. It is common ground that CPW asked consistently during the investigation process for the disclosure of the model and were refused. However, we agree with CPW that this is not a bar to it seeking to raise the point now. We do not know why the point was not originally included -- what passed between CPW and its advisers during the period between the publication of the decision and the lodging of the appeal is rightly protected by professional privilege.

12. CPW's explanation was that given how robustly OFCOM had rejected requests for disclosure during the investigation stage, it was somewhat take aback at the readiness with which OFCOM agreed to disclose the information to the confidentiality ring established by the Tribunal's order. This made CPW realise, Mr Pickford said, that there was in fact no insuperable problem to the disclosure of the model. CPW brought forward its application to amend as soon as that became clear. We consider that this is an entirely plausible explanation, should such an explanation indeed be necessary. The reasons why disclosure was refused during the investigation stage and was then forthcoming at the start of the appeal process may be something that we need to explore

when deciding this part of the appeal so we say no more about it at this stage. In our judgment, the failure to include the argument in the original notice of appeal is not a weighty factor against allowing the amendment at this stage.

13. OFCOM's third point was that allowing this argument to be introduced will open up new areas of factual and legal dispute which will place too great an additional burden on OFCOM in defending the appeal. We were referred to *R (on the application of Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 in which the Court of Appeal considered whether there had been a failure to consult because NICE had disclosed to one of the interested parties a read-only version of the model used in its deliberations and not a fully executable model. The Court of Appeal referred to conflicting factual and expert evidence that the parties had lodged in that case. CPW accepts that there may well be evidence needed from both it and OFCOM to deal with this argument. We do not consider that this is fatal to an application to amend, particularly when that application is made at a fairly early stage of the appeal. This Tribunal is always alert to ensure that the range of issues raised by an appeal is not allowed to proliferate and always has regard to the need to manage cases so as to ensure that their conduct is not only just but also expeditious and economical (see Rule 19 of the Tribunal Rules). Further, we recognise that this appeal is being conducted at a time when OFCOM are defending other appeals in the Tribunal as well as undertaking a heavy load of regulatory work. We have for that reason acceded to requests from OFCOM in this and in other current appeals for more time to comply with procedural timetables. But we do not consider that the pressure of other work on a respondent is a factor that should be taken into account when considering an application to amend to introduce an argument which it is otherwise appropriate to allow.

14. The parties did not agree as to how much precisely CPW had to show to make good its points on inadequate consultation. In the *Eisai* case it appears that the Court of Appeal did not require that the applicant demonstrate either that there was actually something wrong in the model or that, if the applicant had had a fully executable version of the model, they would have been able to persuade NICE to come to a different decision. But the Court of Appeal appears to have based its decision on two factors – first that the parties in that case agreed that sensitivity analysis could not be carried out with the read-only version and secondly that sensitivity analysis was important in checking for problems in a model (see paragraph 44 of the judgment of Richards LJ). For this

reason we considered that the current proposed amendment needed to be sharpened up to clarify CPW's case. The proposed paragraph 74A.3 alleges that the failure to disclose the model and underlying information prevented CPW from being able properly to test the robustness of the modelling "including the key assumptions underlying the models, the formulae used in their construction and the costs forecasts". It is also said that it prevented CPW from being able to carry out sensitivity testing around the assumptions used by OFCOM and from developing alternative pricing proposals for the various price controls adopted.

15. We agree with OFCOM that these allegations are too broad to be helpful. If OFCOM are to defend themselves by showing that there was sufficient other material disclosed to enable CPW properly to test the robustness of key assumptions, formulae and costs forecasts, OFCOM need to know more precisely what parts of the model are being referred to. It should not be left to OFCOM first to define what they understand are the relevant key assumptions, formulae and costs forecasts before they can then try to rebut the allegation. However, we do not consider it would be right, as OFCOM urged us, to make the grant of permission conditional on CPW bringing forward substantive amendments arising from the model since we are not convinced that such a link is a pre-requisite for CPW being entitled to raise the procedural argument.

16. For these reasons, the Tribunal unanimously granted permission to make the amendment proposed to the notice of appeal, subject to the condition that the proposed paragraph 74A.3 is clarified and particularised further by CPW.

Vivien Rose Antony Lewis Arthur Pryor

Charles Dhanowa
Registrar Date: 23 November 2009